

JOHN NICKELSON

DOCKET NO: 647,419

VERSUS

FIRST JUDICIAL DISTRICT COURT

**HENRY WHITEHORN AND
R. KYLE ARDOIN, IN HIS
OFFICIAL CAPACITY AS
LOUISIANA SECRETARY
OF STATE**

CADDO PARISH, LOUISIANA

OPINION AND JUDGMENT

This runoff election involved a one-vote margin. It was proven beyond any doubt that there were at least eleven (11) illegal votes cast and counted. It is legally impossible to know what the true vote should have been.

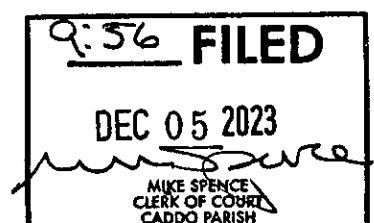
FACTUAL BACKGROUND

On October 14, 2023, a primary election was held for the office of Sheriff of Caddo Parish, State of Louisiana. After the primary election, Plaintiff Nickelson and Defendant Whitehorn were the two candidates who received the most votes.

On November 13, 2023, a general election was held for the elected office of Sheriff. The unofficial returns for the election revealed a one-vote margin of victory in favor of Whitehorn. There was a total of 43,241 votes, with Whitehorn receiving 21,621 votes and Nickelson receiving 21,620 votes.

A recount was held on Monday, November 27, 2023. This recount again resulted in a one-vote margin of victory in favor of Whitehorn.

The instant Petition Contesting Election was filed by Plaintiff Nickelson on November 27, 2023, at 3:39 p.m. The hearing was set for November 30, 2023 at 9:30 a.m., complying with statutory delays for the commencement of trial of an action contesting an election. La. R.S. § 18:1409.



The Petition asserts that there were irregularities with in-person, absentee, and mail-in voting all of which impacted the outcome of the Sheriff's Election. Plaintiff prays that this court either render a judgment declaring the victor of this election, or that a new election be ordered.

After the trial on November 30, 2023, the court ordered dates and times for Plaintiff and Defendant to file post-trial briefs with the court.

Plaintiff's pre-submission brief was received by the court at 11:26 a.m. on December 2, 2023. Defendant's pre-submission response brief was received by the court at 11:21 on December 4, 2023. Both submissions complied with the court's ordered time deadlines.

Based on the pre-submission briefs of the parties, the case was deemed submitted at 12:01 p.m. on December 4, 2023.

DEFENDANT'S EXCEPTIONS

Whitehorn asserted multiple exceptions to Nickelson's Petition, each of which will now be briefly discussed.

First, is the peremptory exception of no right of action. Louisiana's Revised Statutes governing elections recognize that both qualified electors and candidates may bring actions contesting elections and states against whom such suits may be brought. La. R.S. § 18:1401; 18:1402. Plaintiff Nickelson is clearly a candidate in the election for the Sheriff's Office in Caddo Parish, Louisiana. Therefore, Defendant's exception of no right of action is denied.

Second, Defendant asserted the peremptory exception of no cause of action. Plaintiff's Petition specifically alleges that two people voted twice, by mail and in

person on election day. Further, the Petition asserts that, after review of the public records, four individuals under interdiction voted in the election. Lastly, the Petition asserts irregularities with absentee and mail-in ballots such that some of the “accepted” ballots should have been rejected. Taking these allegations of fact as true, and given the one-vote margin, any one of the aforementioned improper votes could have resulted in a different outcome. *Brunet v. Evangeline Par. Bd. of Sup'rs of Elections*, 376 So. 2d 633 (La. Ct. App.), writ denied sub nom. *Brunet v. Evangeline Par. Bd. of Supervisors of Elections*, 380 So. 2d 623 (La. 1979), and writ denied sub nom. *Brunet v. Evangeline Par. Bd. of Supervisors of Elections*, 377 So. 2d 1240 (La. 1979). The exception of no cause of action is denied.

Third, Defendant asserted the exception of prescription. Louisiana law states that any action contesting an election involving election to office “shall be instituted not later than 4:30 p.m. of the ninth day after the date of the election...” La. R.S. § 18:1405. Plaintiff filed this Petition Contesting Election on November 27, 2023, at 3:39 p.m. Therefore, Plaintiff’s suit was timely filed on the ninth day after the election on November 18, 2023. This exception is denied.

Fourth, Defendant asserted the exception of *res judicata*. For the law of *res judicata* to apply, there must first and foremost be a judgment that is both valid and final. *Chevron U.S.A., Inc. v. State*, 2007-2469 (La. 9/8/08), 993 So. 2d 187. There has been no previous litigation on the present matter, meaning there is no previous valid and final judgment that could preclude litigation. Defendant’s exception is denied.

Lastly, Defendant asserted the exception of preemption, arguing that Plaintiff has expanded his pleadings after the deadline to file an election contest suit as set forth in Louisiana Revised Statute 18:1405. However, Defendant does not specifically identify any such expansion. Defendant's exception of preemption is also denied.

THE MERITS

The Petition made numerous allegations of irregularities in the conduct of the election. The evidence at trial was presented in three categories, including: double voting; interdiction; and irregularities regarding absentee and mail-in ballots.

If there were irregularities in any of these three categories, because of the one-vote margin, it would be legally impossible to determine the outcome of the election.

In Person Voting

Plaintiff's first witness was the Commissioner of Elections in the Louisiana Secretary of State's Office, Sherri Hadskey. After a brief overview of this job position, Hadskey was given copies of the paper sheets which voters sign before casting their votes at their designated precincts. These sheets were presented and accepted by the court into evidence.

In the course of questioning, Hadskey confirmed that two individuals voted twice. One of the individuals had a notation next to his/her name on the signature sheet stating they had early voted in the subject election. However, there was also a signature next to the name. Hadskey confirmed this signature would mean that

the individual voted in person the day of the election, therefore casting two votes total.

As to the second individual, the signature not only appeared on the “flap” of a mail-in ballot, but also on the signature sheet that would have been signed the day of the election. Again, Hadskey confirmed that the signature on the signature sheet would mean the individual voted in person the day of the election, effectively casting two votes total.

Hadskey also testified that there is no way for her, or anyone else, to know how or for whom these individuals voted due to the secret nature of ballots. These two individuals each cast two votes. An individual may not vote more than once in an election, meaning that these individuals together cast two extra votes in this election, which ended in a one-vote margin. La. R.S. § 18:1461.2.

During cross examination of Hadskey, the defendant’s counsel asked questions regarding whether Plaintiff sought to challenge either the mail-in ballot or the early voting ballot of either of the two individuals before the election. *See*, La. R.S. 18:1315. However, the court finds this question misplaced.

Plaintiff introduced this evidence to show that two individuals voted twice in this election, not to challenge the absentee/mail-in or early voting ballot. Further, the court notes that, even with due diligence, Plaintiff would not have known to challenge the mail-in or the early voting ballot of either individual before the election because the double voting did not occur until the day of the election.

Interdicted Voters

Louisiana law provides that individuals who have been judicially declared as full interdicts are ineligible and not permitted to register or vote. La. R.S. §18:102. As its second witness, Plaintiff called Caddo Parish Clerk of Court, Mike Spence.

Plaintiff's counsel approached Spence with a spreadsheet replicating the signature sheet utilized on election day by the precincts, as well as copies of interdiction papers filed into the property records of Caddo Parish. Counsel indicated four individuals listed in the spreadsheet and asked Spence to confirm that the individuals matched those who are recorded as being fully interdicted, and therefore ineligible to vote. Spence confirmed each individual interdict indicated to him. He also testified that there is no way to know for whom these individuals voted.

The court personally examined the records offered into evidence as Exhibit C, and identifies the interdicted individuals by initials only so as to preserve their anonymity. The records included the interdictions of: JBG, JTB, CLS, and ABW.

Defendant's counsel asked Spence how long it takes to gather such interdiction records together, to which Spence responded that it does not take long at all. It is noted that each record of interdiction contains a certificate, as required by law, stating when the record was pulled.

Based on defense counsel's line of questioning, the court presumes that Defendant was alluding to the fact that these interdiction records could have been pulled, and the ineligible voters challenged, before the election. However, the court again recognizes that these individuals are noted as having voted in person the day of the election. Therefore, Plaintiff would not have known these ineligible

individuals were going to vote at an early time, precluding them from knowing the interdiction records would need to be obtained.

Absentee and Mail-in Ballots

As its third and final witness, Plaintiff called Dale Sibley from the Caddo Parish Registrar of Voters. The focus of this examination concerned absentee and mail-in ballots and whether they complied with the requirements of the law. Louisiana law requires that the voter sign the ballot “flap” together with one witness’s signature. La. R.S. § 18:1306.

A selection of between fifty and sixty absentee and mail-in ballots that were accepted (thus counted), and fifty that were rejected were brought in as evidence after being reviewed by Plaintiff’s counsel and Sibley. (Exhibit J). Rejected ballots included those that had no witness signature or no voter signature.

Plaintiff’s counsel and Sibley went through numerous accepted ballots while Sibley was on the witness stand. Some of the accepted ballots had no witness signature, as confirmed by Sibley, who testified that based on such accepted ballots it would have to be assumed that some counted ballots did “fall through the cracks.”

The court personally examined the entirety of Exhibit J, and found five defective ballots that were counted in the total tabulation.¹ Four of these ballots, identified in this opinion by initials only, had no witness signature on the ballot

¹ Only a small sample was examined by the court. It is emphasized that this court did not perform an extrapolation of what these numbers could have meant in connection with the remaining 7,000 plus absentee and mail-in ballots. It is quite possible that there were other defective ballots which were also counted. However, it was unnecessary to review the other remaining 7,000 plus ballots based on the court’s finding in the context of this one-vote election.

“flap.” These are the ballots of BWW, LJW, SHR, and HK. The court further found the fifth ballot, that of AJT, to be devoid of any signature or mark by the voter. The examination included less than 60 ballots that were accepted as votes, five of which are found to be illegally counted as they did not comply with the statute. La. R.S. § 18:1306.

During cross examination, Defendant’s counsel asked Sibley whether Plaintiff could have reviewed the ballot flaps before the election in order to ascertain if they complied with law. Sibley responded that once the ballots are received by his office, no one is allowed to touch or examine them before the election except his staff. Therefore, Plaintiff could not have reviewed and challenged these ballots before the election. Lastly, like the other witnesses, Sibley testified that there is no way to know how or for whom these individuals voted.

DISCUSSION

Preliminarily, the court notes that Plaintiff asks this court to order a new election, a remedy provided for by law. La. R.S. § 18:1432(A)(1). This statute also provides when a judge may grant such a remedy, stating in pertinent part:

“If the trial judge in an action contesting an election determines that: it is **impossible to determine the result** of election...or the number of **unqualified voters who were allowed** to vote by the election officials was sufficient to change the result of the election if they had not been allowed to vote...the judge may render a final judgment declaring the election void and ordering a new primary or general election for all the candidates...” (emphasis added).

The decision of the Louisiana Supreme Court in *Adkins v. Huckaby* is controlling regarding the overarching issue currently before this court. In *Adkins*, the Court stated that “courts are not powerless to overturn elections where

irregularities are present,” citing 18:1432. *Adkins v. Huckabay*, 1999-3605 (La. 2/25/00), 755 So. 2d 206. The Court further stated that it would not “sanction irregularities that circumvent the plain purpose of the law and open the door to the possibility of manipulation of elections,” repudiating any “but for” test. *Id.*

The *Adkins* Court found that certain ballots were disqualified and should not have been included. *Id.*, at 221. As a result, and “because of the constitutional guarantee to secrecy of the ballot” and that the margin of victory “was three votes, it is impossible to determine the result of this runoff election.” *Id.*, at 222 (citing La. R.S. § 18:1432). Ultimately, the court found that because it was impossible to determine the results, the election results were properly vacated by the trial court and a new general election was to be scheduled and set. *Id.*, at 222.

In the instant case, it was confirmed by witness testimony that two individuals voted twice, or “double voted,” and that at least four individuals who were then and currently fully interdicted cast ballots in person the day of the election. It was further confirmed by testimony that several accepted absentee or mail-in ballots did not comply with Louisiana law, and should have been rejected. Altogether, there are at least eleven votes that should not have counted in this election that resulted in a one-vote margin.

With respect, Defendant’s arguments submitted by counsel in the post-trial brief are misapplied and without merit. Defendant cites and places great reliance upon *Nugent v. Phelps*. The facts in *Nugent* are patently distinguishable from the instant case. In *Nugent*, inter alia, schemes of corruption and bribery were involved as to cast and counted votes. *Nugent v. Phelps*, 36,366 (La. App. 2 Cir. 4/23/02), 816 So. 2d 349, writ denied, 2002-1153 (La. 5/10/02), 815 So. 2d 850.

In the instant case, the primary issues rising to the level of irregularities are different. The facts of this case reveal irregularities concerning votes that were not legally cast in the first place. Those purported votes should never have been counted.

Further, as to the alleged failure of the plaintiff to attack these votes before they were cast, Plaintiff could not have known, days before the election, who would attempt to vote on election day. Plaintiff could not have known, days before the election, that persons would be improperly attempting to vote. In that there could have been no evidence reviewed, nor made available, before the eleven so-called subject “votes” were cast, to require such review and objection prior to the date of voting is totally illogical. The so-called eleven “votes” referenced herein which are at issue, and which were counted, were actually never votes at all. These were void *ab initio*.

Another flaw of Defendant’s argument is that it calls upon this court to adopt an evidentiary presumption against Plaintiff for failure to call witnesses as to how they voted. This is flawed as unconstitutional in light of Article XI, Section 2 of the Louisiana Constitution which grants privacy to voters as to their votes cast. Defendant’s arguments are neither persuasive nor valid.

CONCLUSION

It defies logic in this particular case to conclude that it is possible to determine the accurate results of the runoff election, especially considering the one-vote margin. Just one illegal vote could have affected the outcome, and here, multiple illegal votes were cast and counted.

This court finds that at least eleven votes should not have been counted in this one-vote margin election. Specifically, there were two individuals who voted twice; there were at least five votes cast by absentee/mail-in ballots which should not have been counted for failure to comply with law; there were four invalid votes cast by interdicted persons who were unqualified voters. Because of the constitutional guarantee of secrecy of these ballots, it is impossible to determine the result of this election. La. R.S. § 18:1432; La. Const. Art. XI, § 2.

For the foregoing reasons, a new runoff election must be ordered. This new runoff election is necessary not only for the candidates, but also to ensure the public's right to untainted election results.

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the results of the November 18, 2023 runoff election for the office of Sheriff of Caddo Parish, State of Louisiana are declared void.²

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that a new runoff election for the office of Sheriff of Caddo Parish, State of Louisiana shall be conducted between candidates Henry Whitehorn and John Nickelson, in accordance with law, and in accordance with the protocols and schedule of the Secretary of State of the State of Louisiana.³

² La. R.S. § 18:1432(A)(1).

³ Based on the testimony of Commissioner of Elections in the Louisiana Secretary of State's Office, Sherri Hadskey, the next scheduled election will take place on March 23, 2024.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Caddo Parish Clerk of Court duly notify the Secretary of State of the State of Louisiana.

Signed this 5th day of December, 2023, in Shreveport, Caddo Parish, Louisiana, at 9:48 o'clock a.m.



E. JOSEPH BLEICH
JUDGE "AD HOC"
FIRST JUDICIAL DISTRICT COURT

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